IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ANTHONY DIMEO, III,	:	
Plaintiff,	:	
	:	**No. 06-1544**
v.	:	
TUCKER MAX	:	
Defendant.	:	

ORDER

AND NOW, this ____ day of _______________, 2006, upon consideration of Defendant's Motion to Dismiss the Complaint with Prejudice, and any response thereto, it is hereby ORDERED that the Complaint is dismissed with prejudice.

BY THE COURT:

____
The Honorable Stewart Dalzell

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	:	
Defendant.	:	

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant, Tucker Max, by and through his undersigned counsel Montgomery, McCracken, Walker & Rhoads, LLP, moves the Court to dismiss the Complaint with prejudice. In support of the motion, defendant avers as follows:

1. Plaintiff's Complaint alleges the following three counts, none of which is cognizable as a matter of law: (a) defamation; (b) violation of the Communications Act of 1943; and (c) punitive damages.

2. Plaintiff's defamation claim (Count I) fails as a matter of law because Title V of the Telecommunications Act of 1996 (known as the Communications Decency Act) provides immunity to defendant, the provider of an "interactive computer service." *See, e.g.,* 47 U.S.C. § 230(c)(1); *Green v. AOL*, 318 F.3d 465 (3rd Cir. 2003); *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003); *Ben Ezra, Weinstein & Co. v. America Online, Inc.* 206 F.3d 980 (10th Cir. 2000); *Zeran v. America Online, Inc.*, 129 F.3d 227 (4th Cir. 1997); *Parker v. Google, Inc.*, Civ. A. No. 04-CV-3918, 2006 WL 680916 (E.D. Pa. Mar. 10, 2006); *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.C. Cir. 1998).

3. Plaintiff's defamation claim also fails because the statements at issue are opinion, rhetorical hyperbole or figurative language, which are constitutionally protected and cannot form the basis for liability in this case. *See, e.g., Greenbelt Coop. Publ' Ass'n. v. Bresler*, 398 U.S. 6 (1970); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990); *Baker v. Lafayette Coll.*, 532 A.2d 399, 402 (Pa. 1987); *Constantino v. Univ. of Pittsburgh*, 766 A.2d 1265, 1270 (Pa. Super. 2001); *Savitsky v. Shenandoah Valley Publ' Corp.*, 566 A.2d 901 (Pa. Super. 1989).

4. In addition, two of the statements on which plaintiff's defamation claim is based are time-barred by Pennsylvania's one year statute of limitations. *Bradford v. American Media Oper., Inc.*, 882 F. Supp. 1508, 1513 (E.D. Pa. 1995) (citing 42 Pa. C.S.A. § 5523(1)).

5. Plaintiff's claim for violations of the Communications Act of 1943 (Count II) fails because it is a criminal statute that does not provide a private right of action to plaintiff.

6. Even if the Communications Act did provide a private right of action to plaintiff, it would not apply to defendant because the Act excludes "interactive computer service" providers, like defendant, from liability. 47 U.S.C. § 223(h)(1)(B) (referencing 47 U.S.C. § 230(f)(2)).

7. Moreover, the Communications Act does not apply in this case because plaintiff did not "receive" any of the statements from defendant; rather, the statements simply were "posted" on defendant's Internet website.

8. In addition, the Communications Act, as applied to defendant in this case, is unconstitutional.

9. Finally, plaintiff's claim for "punitive damages" (Count III) also fails as a matter of law because "punitive damages" is not a cause of action, but rather a type of damages.

The grounds for this motion are set forth further in the accompanying memorandum of law, which is incorporated herein by reference.

Respectfully submitted,

MT 829

Dated: April 19, 2006

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

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Rocker Management, LLC v. John Does, 2003 WL 22149380
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OTHER AUTHORITIES

Noveck, Cyberspace: The Role of the Cyberlawyer, 9 B.U. J. SCI. & TECH. L. 1 (2003) 16

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MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT WITH PREJUDICE

Defendant, Tucker Max, by and through his undersigned counsel Montgomery, McCracken, Walker & Rhoads, LLP, respectfully submits this memorandum of law in support of his motion to dismiss the Complaint with prejudice.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the latest in a string of attempts by the plaintiff, Anthony DiMeo, III, to silence speech that lampoons or criticizes him. Mr. DiMeo's strategy for combating the negative publicity that has accompanied his increasing exposure to the public eye has not been to combat that speech with more speech; instead it has been to sue or threaten to do so. Whether it has been a parody of a Christmas card that Mr. DiMeo sent or commentary on a disastrous New Year's Eve party thrown by him, plaintiff has consistently sought recourse by turning to the court for protection against speech that he does not like.

But this case is different. Mr. DiMeo does not attempt to silence an established newspaper with a wide-ranging readership. Instead, his lawsuit is directed at an emerging medium that Congress has specifically sought to exempt from defamation lawsuits: the Internet. In bringing this case, plaintiff seeks to impose restrictions in an area that Congress has specifically declared federal policy to be "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. 230(b)(2).

It is not an exaggeration to claim that plaintiff's suit strikes at the heart of free speech rights on the Internet. In this case, plaintiff seeks to silence an Internet message-board hosted on defendant's website that discussed and criticized, among other things, plaintiff's public New Year's Eve party that went horribly awry. By doing so, plaintiff threatens all on-line conversation that could potentially offend or be interpreted as "annoying" to someone. Thus, in plaintiff's world, instead of a burgeoning medium where ideas are able to be debated freely, and where someone of the most modest means can make his voice heard on relatively equal footing with the richest among us, we would have a world where the owners of websites would constantly be looking over their shoulders and policing their posts for any comment that could potentially offend or be construed as defamatory in nature, and where only those who could afford costly litigation brought by the thin-skinned would dare to tread.

That, however, is not the law. The Communications Decency Act, by its express terms, prohibits lawsuits such as the one now before this Court. That law bars any liability on the part of an interactive computer services provider, like defendant here, from suit for defamatory or harassing language authored by another. Indeed, just three years ago the Third Circuit, following its sister circuits, upheld the dismissal of a similar complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for causes of action nearly identical to the claims brought by plaintiff here. *See Green v. AOL*, 318 F.3d 465 (3d Cir. 2003).

Even if plaintiff's defamation claim (Count I) could survive the express immunity provided by the Communications Decency Act, it would fail for other reasons, chief among them is that the statements are not capable of having a defamatory meaning because they are nothing more than expressions of opinion, rhetorical hyperbole and figurative language – not factual statements – that are protected under long-standing federal and state case law. Moreover, at least two of the statements about which plaintiff complains are time-barred by Pennsylvania's one-year statute of limitations for defamation claims.

Like plaintiff's defamation claim, his so-called "Communications Act" claim (Count II) also fails as a matter of law. That claim is based on a Congressional statute enacted to prevent husbands from stalking their estranged wives through "computer phones." The biggest – and clearly insurmountable – hurdle facing plaintiff with respect to this claim is that Congress *did not create a private cause of action*, either express or implied, for violations of the Act. Consequently, plaintiff cannot maintain his claim against defendant.

Even if the Communications Act did provide a private cause of action, plaintiff's claim would fail for three other separate and independent reasons. First, the Communications Act does not apply to "interactive computer service" providers like defendant. Second, the Act does not apply in this case because defendant never "sent" any "message" to plaintiff, which is required for liability (criminal, not civil) under the Act. Third, the Act would be unconstitutional as applied to defendant in this case.[1]

Plaintiff's claims are beyond being simply meritless – they are contrary to existing and well-established case law. Indeed, plaintiff (and his counsel) had a duty to investigate these causes of action *before* filing the Complaint, and before defendant was forced to expend time and

[1] The third, and final, count in the Complaint is for "Punitive Damages," which is not a cause of action – it is a type of relief that is contingent upon a finding of liability. Thus, it too should be dismissed with prejudice. Defendant has not addressed this issue further; however, should the Court wish additional support for the proposition that Count III does not state a claim upon which relief may be granted, defendant requests the opportunity to file a brief supplemental memorandum of law.

money responding to it. Because the law is crystal clear, and there are no facts to support any cause of action against defendant, the Court should dismiss the Complaint with prejudice.

II. STATEMENT OF FACTS[2]

Defendant Tucker Max is the owner of an Internet website that can be found on the worldwide web at http://www.tuckermax.com (the "Website"). Exhibit A, Compl., at ¶ 4. The Website contains a number of features, including various "message-boards" that allow multiple computer users throughout the world to write comments (known as "posting") on different topics, thus creating a virtual forum for users to correspond with each other and exchange information. Exhibit B, selected pages from Website.[3]

The Website is not – and does not claim to be – an academic or intellectual journal. To the contrary, it contains humorous stories, some of which are sophomoric and immature, as well as acerbic and biting commentary. *Id.* In fact, this case concerns just such comments about plaintiff, who has been the subject of several "posts" on the Website's message-board. Exhibit A, Compl., at ¶ 5. The Complaint identifies, but does include as exhibits, six "posts" that plaintiff claims are defamatory. *Id.* at ¶ 5(a)-(f). Attached hereto as exhibits C through F are copies of four of the "posts" in their entirety.[4] The offending "posts" include the following statements:

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[2] Solely for the purposes of this Motion to Dismiss, defendant accepts, as he must, the facts set forth in the Complaint.

[3] Although a court ordinarily will not look beyond the pleadings in resolving a motion to dismiss, a court may consider documents that are "integral to or explicitly relied upon" in the Complaint. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *see also Karl v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 78 F. Supp. 2d 393, 395 fn. 4 (E.D. Pa. 1999) (Dalzell, J.). In this case, the Complaint references, without attaching as exhibits, certain statements created by third parties that were posted on a message-board maintained on defendant's Website. Those statements, as well as the "threads" surrounding those statements and the Website itself, are not only "integral to [and] explicitly relied upon" in the Complaint, they actually form the basis for all of plaintiff's claims. Accordingly, the Court may consider the actual statements at issue, the "threads" related to those statements, and the Website itself in deciding defendant's motion to dismiss. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("Just as a reader must absorb a printed statement in the context of the media in which it appears, a computer user necessarily views web pages in the context of the links through which the user accessed those pages.")

a. "Maybe you should find your validation elsewhere…preferably at the end of a magnum." Exhibit A, Compl., at ¶ 5(a).

b. "I just wanted to let you know that I think you are the biggest piece of shit I have ever heard of and I hope you die soon." Exhibit A, Compl., at ¶ 5(b).

c. "Aha! I know why Arlen Specter got invited to all those Renamity parties! Could it be …. bribery of your local politician? Its the only way AD3 can get back at the TMMB…" Exhibit C (*see also* plaintiff's edited version at Exhibit A, Compl., at ¶ 5(c)).

d. "Just to make thinks simpler for everyone, to contact this sub-human: dimeo@renamity.com or http://www.anthonydimeo.com/contact_top.htm. He's got a neat, nice little page there from which we can all harass him. What a fucking cocksmoker." Exhibit D (*see also* plaintiff's edited version at Exhibit A, Compl., at ¶ 5(d)).

e. "God, that guy has absolutely ZERO sense of humor. I cant believe no one has killed him yet. Further, one would think that a man of his *impressive means* could do better than sending a holiday card by EMAIL! Especially considering he's an e-pariah since last year's messageboard crusade that mocked him over and over." Exhibit E (*see also* plaintiff's edited version at Exhibit A, Compl., at ¶ 5(e)).

f. "What a PR wizard. You threw an absolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud, and yet refunds are on a case-by-case basis. I guess if you drank more than two wine spritzers you clearly go your money's worth and are not eligible for a refund." Exhibit F (*see also* plaintiff's edited version at Exhibit A, Compl., at ¶ 5(f)).

Each of the "posts" contain, among other information, the "posters'" screen name (typically a name created by the "poster"), the date of the "post," and occasionally the location of the "poster." *See* Exhibits C through F.

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[4] Defendant has been unable to locate two of the "posts" identified in the Complaint at paragraphs 5(a) and 5(b). For purposes of this motion to dismiss, defendant accepts that the "posts" identified in paragraphs 5(a) and 5(b) of the Complaint are accurate; however, defendant does not concede that said "posts" were published on his Website and will demand strict proof of publication should this case proceed to trial. The Court may consider the four "posts" attached as Exhibits C through F because they form the basis of each and every one of plaintiff's claims. *See* fn. 3, *supra*. Indeed, as this Court noted, "it would be odd … to rule on dismissal of a claim of defamation without being able to consider the allegedly defamatory material…." *Karl*, 78 F. Supp. 2d at 395 fn. 4.

Significantly, plaintiff does not allege that any of the "posts" about which he now complains were authored by the defendant; rather, plaintiff avers only that defendant "through his [Website] **publishes** defamatory statements aimed at Plaintiff...." Exhibit A, Compl., at ¶ 5 (emphasis added). Indeed, given the requirements of Rule 11 of the Federal Rules of Civil Procedure, plaintiff could not allege that defendant authored any of the "posts" at issue.[5] In fact, the "posts" at issue in the Complaint were authored by the following "posters": PowderJ in Northern California; ibrakeforsox; leavemealone; and CJ in Arizona. *See* Exhibits C through F.

As a result of the six messages "posted" on the Website, plaintiff claims he suffered harm both personally and professionally. Exhibit A, Compl., at ¶ 11. Consequently, he initiated this three count lawsuit based on the following causes of action: defamation (Count I); violation of the Communication Act of 1943 (47 U.S.C. § 223(a)(1)(c)), as amended by Violence Against Woman and Department of Justice Reauthorization Act of 2005, (Count II); and punitive damages (Count III).

III. LEGAL ARGUMENT

A. Plaintiff's Defamation Count Fails To State A Claim.

Count I of the Complaint, captioned as a claim for "Defamation," is fatally flawed because the Communications Decency Act provides immunity for owners and operators of Internet websites who publish messages authored by third parties. That is exactly the situation in this case – plaintiff has sued defendant based on "posts" authored by others that appeared on his Website. Because defendant is immune from such claims, Count I fails as a matter of law and should be dismissed with prejudice.

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[5] While defendant does "post" on the Website's message-boards, he does so using his actual name, "Tucker Max," along with a picture of himself. *See* Exhibit G.

Plaintiff's defamation claim suffers from other fatal deficiencies as well. First, the "posts" at issue are statements of opinion, rhetorical hyperbole or figurative language that are not capable of being proven true or false. Accordingly, they are constitutionally protected and are not capable of defamatory meaning under Pennsylvania law. Second, at least two of the "posts" are time-barred by Pennsylvania's one-year statute of limitations for defamation claims. These grounds also require the dismissal of the Complaint with prejudice.

1. The Communications Decency Act of 1996 Shields Defendant From Liability Based On Plaintiff's Defamation-Related Claims.

In 1996, the United States Congress passed the Communications Decency Act (the "CDA"), which was intended "to preserve the vibrant and competitive free market that presently exists on the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

In order to accomplish the goal of preserving the freedom found on the Internet and to keep it "unfettered by Federal or State regulation," the CDA changed traditional liability for defamation by providing absolute immunity to those who merely publish statements authored by others: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." *Id.* at § 230(c)(1). As one federal court found:

> Congress decided not to treat providers of interactive computer services like other information providers such as newspapers, magazines or television and radio stations, all of which may be held liable for publishing or distributing obscene or defamatory written material prepared by others. While Congress could have made a different policy choice, it opted not to hold interactive computer services liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.

Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.C. Cir. 1998); *see also Batzel v. Smith*, 333 F.3d 1018, 1026 (9th Cir. 2003) ("The specific provision at issue here, § 230(c)(1), overrides the traditional treatment of publishers, distributors, and speakers under statutory and common law."); *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) ("The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium.... Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.").

Numerous courts have applied the CDA's immunity provision to cases like the one now before this Court. Indeed, just three years ago the Third Circuit in *Green v. AOL*, 318 F.3d 465 (3d Cir. 2003), affirmed the dismissal of a complaint filed against an interactive computer service provider based on statements "posted" in a "chat room" maintained on defendant's Internet website.

In that case, certain unidentified defendants allegedly impersonated the plaintiff in an AOL "chat room," solicited gay sex while impersonating him, and accused him of being bisexual. *Id.* at 469. Plaintiff sued AOL for defamation on the theory that it, the interactive computer service provider on whose system the "chat room" was located (or "hosted"), was liable by "refusing to take necessary action against John Does 1 and 2, who allegedly transmitted harmful online messages to plaintiff and others." *Id.*

The Third Circuit rejected plaintiff's argument, holding that 47 U.S.C. § 230(c)(1) shields defendants such as AOL from defamation and negligence claims:

> There is no real dispute that Green's fundamental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network. Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network - actions quintessentially related to a publisher's role. Section 230 "specifically proscribes liability" in such circumstances.

Id. at 471.

The Third Circuit is not alone in holding that the CDA provides immunity to "publishers" of third party statements. *See, e.g., Ben Ezra, Weinstein & Co. v. America Online, Inc.*, 206 F.3d 980, 984-86 (10th Cir. 2000) (holding defendant AOL immune from liability for posting plaintiff's stock price on its website, which it obtained from third parties); *Zeran*, 129 F.3d at 328 (holding that section 230 of the CDA "plainly immunizes computer services providers ... from liability for information that originates with third parties"); *Parker v. Google, Inc.*, Civ. A. No. 04-CV-3918, 2006 WL 680916, at *6 (E.D. Pa. Mar. 10, 2006) (granting motion to dismiss complaint for defamation, invasion of privacy and other claims based on third party statements posted on defendant's USENET on-line bulletin boards); *Blumenthal*, 992 F. Supp. at 52-53 (granting motion to dismiss complaint filed against AOL based on allegedly defamatory statements available through AOL but authored by a third party).

The fact pattern here is nearly identical to virtually all of the other cases brought against interactive computer service providers for comments "posted" by third parties. As an initial matter, there can be no dispute that defendant's message-boards are an "interactive computer service" as defined by the CDA.[6] *See* 47 U.S.C. § 230 (f)(2). A cursory review of defendant's Website quickly reveals that the message-board "provides or enables computer access by multiple users to a computer server." *Id.*; *see also Batzel*, 333 F.3d at 1030 (Museum Security Network website and listserv "fits into the broad definition of 'interactive computer service,' because the language of § 230(c)(1) confers immunity not just on 'providers' of such services, but also on 'users' of such services"); *Parker*, 2006 WL 680916 at *6 ("[t]here is no doubt that [Google's USENET bulletin boards] qualify[y] as an 'interactive computer service'....").

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[6] "The term 'interactive computer service' means any information service, system or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f)(2).

Because plaintiff does not, and cannot, allege that defendant authored the statements at issue, defendant cannot be liable to plaintiff for defamation or any of the other related theories (such as false light, misappropriation or invasion of privacy) advanced by plaintiff. *See, e.g., Green*, 318 F.3d at 470; *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003); *Ben Ezra, Weinstein & Co.*, 206 F.3d at 984-86; *Zeran*, 129 F.3d at 328; *Parker*, 2006 WL 680916, at *6; *Blumenthal*, 992 F. Supp. at 49-53.

Here, the allegedly defamatory comments "posted" on the Website's message-boards were made by other "information content providers" (as defined by 47 U.S.C. § 230(f)(3)), not defendant. *See* Exhibit C through F. Defendant merely "published" those statements on his Website. Consequently, he is immune from liability under the express terms of the CDA and well-established case law.

2. The Statements At Issue Are Not Defamatory Because They Are Not Capable Of Being Proven False.

In addition to the immunity provided under the CDA, defendant cannot be liable because the statements at issue are not capable of having a defamatory meaning – they are nothing more than expressions of opinion that cannot be proven true or false, and non-actionable rhetorical hyperbole, figurative language and vigorous epithet.[7] *See, e.g., Greenbelt Coop. Publ' Ass'n. v. Bresler*, 398 U.S. 6 (1970); *Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990); *Beverly Enter., Inc. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999); *Moore v. Cobb-Nettleton*, 889 A.2d 1262, 1267 (Pa. Super. 2005).

In *Milkovich*, the United States Supreme Court reaffirmed the principle that the First Amendment protects statements that cannot "reasonably [be] interpreted as stating actual facts" about a person. 497 U.S. at 30 (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 57 (1988)). Thus, under *Milkovich*, the key inquiry is whether the statements at issue are "an articulation of an objectively verifiable event" that is "susceptible of being proved true or false." *Id.* at 21-22. If it is not, there can be no liability.

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[7] It is "'the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit.'" *Beverly Enter., Inc. v. Trump*, 182 F.3d 183, 187 (3d Cir. 1999) (quoting *MacElree v. Philadelphia Newspapers, Inc.*, 674 A.2d 1050, 1053 (Pa. 1996)).

Pennsylvania courts have recognized and followed these constitutional limits on liability for opinions that cannot reasonably be interpreted as stating actual facts. Thus, Pennsylvania courts acknowledge that, "[o]nly statements of fact, not expressions of opinion, can support an action for defamation." *Constantino v. Univ. of Pittsburgh*, 766 A.2d 1265, 1270 (Pa. Super. 2001); *see also Mathias v. Carpenter*, 587 A.2d 1, 3 (Pa. Super. 1991) ("Statements of opinion without more are not actionable.").

Figurative language, rhetorical hyperbole and insults, like expressions of opinion, also cannot form the basis of a defamation claim. Indeed, this has been well settled law since the Supreme Court decided *Greenbelt* more than 35 years ago, and it has been reaffirmed by the Supreme Court, as well as other federal and Pennsylvania state courts since then. *See, e.g., Nat'l. Ass'n. of Letter Carriers*, 418 U.S. at 284-85; *Milkovich*, 497 U.S. at 30; *Beverly Enter.*, 182 F.3d at 187; *Rush v. Philadelphia Newspapers, Inc.*, 732 A.2d 648, 653 (Pa. Super. 1999); *Savitsky v. Shenandoah Valley Publ' Corp.*, 566 A.2d. 901, 905 (Pa. Super. 1989).

Here, none of the statements at issue is capable of having a defamatory meaning. The "posts" are nothing other than opinions, insults, rhetorical hyperbole and the like that have offended plaintiff. That alone, however, does not provide him with a cause of action against defendant.

a. Four Of The Six Statements Are Expressions Of Opinion That Are Constitutionally Protected From Plaintiff's Claims.

Of the six statements at issue in this lawsuit, four clearly are expressions of opinion that cannot be proven true or false:

- "Maybe you should find your validation elsewhere...preferably at the end of a magnum." Exhibit A, Compl., at ¶ 5(a).
- "I just wanted to let you know that I think you are the biggest piece of shit I have ever heard of and I hope that you die soon." *Id.* at ¶ 5(b).
- "He's got a neat, nice little page there from which we can harass him." *Id.* at ¶ 5(d).
- "I can't believe no one has killed him yet." *Id.* at ¶ 5(e).

On their face, and given the most liberal reading, the only reasonable and logical conclusion to be drawn is that the statements are opinions, which are not actionable under any of plaintiff's legal theories. Although these four "posts," "were undoubtedly offensive and distasteful [to plaintiff], the law of defamation does not extend to mere insults.... Statements which are merely annoying or embarrassing or no more than rhetorical hyperbole or a vigorous epithet are not defamatory." *Beverly Enter.*, 182 F.3d at 187; *see also Karl*, 78 F. Supp. 2d at 397 ("Simply because a communication annoys or embarrasses a person does not mean it is defamatory as a matter of law.").

Because none of the four statements is "susceptible of being proved true or false," they are protected by the First Amendment and cannot form the basis for plaintiff's defamation claim in this case. *Milkovich*, 497 U.S. at 20.

b. The Two Remaining Statements At Issue
Are Rhetorical Hyperbole, Which Is Not Actionable.

The other two statements on which plaintiff's defamation claim is based also are not actionable because they are rhetorical hyperbole or vigorous epithet that cannot form the basis of a defamation claim.

Reading only plaintiff's abbreviated version of those statements, however, could give the mistaken belief that they are factual statements capable of defamatory meaning:

- "Now I know why Arlen Specter got invited to all those Renamity Http://www.renamity.com/galary/birthdaybash/escf0009 parties! Could it be...bribery of your local politician." Exhibit A, Compl., at ¶ 5(c) (the "Bribery Post").

- "You threw an absolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud." *Id.* at ¶ 5(f) (the "Fraud Post").

But the Court must consider the statements *in context* in order to determine whether they are capable of defamatory meaning – that is, the Court "must look to the way in which the communication would have been interpreted by the reasonable, average person in its intended audience, and in this inquiry the nature of the audience is significant." *Karl*, 78 F. Supp. 2d at 397; *see also Savitsky*, 566 A.2d at 904 (court must consider the effect that the statements would "naturally engender, in the minds of the average persons among whom [they were] intended to circulate") (quoting *Corabi v. Curtis Publishing Co.*, 273 A.2d 899, 907 (Pa. 1971)). Given this standard, and the fact that the statements were intended to, and in fact did, circulate on the Website's message-board – a notoriously unreliable and informal medium – neither the Bribery Post nor the Fraud Post can, as matter of law, be capable of defamatory meaning.

Several cases are on point with the facts here. In *Greenbelt*, for example, plaintiff, a land developer, sought a zoning variance from the local municipality for the construction of high-density housing, while at the same time the municipality was seeking to purchase a tract of land owned by the developer for the construction of a new high school. 398 U.S. at 7. The negotiations between the developer and the municipality led to a series of public meetings that were reported in defendant's newspaper. *Id.* In two articles, the newspaper reported that some citizens characterized plaintiff's negotiating position as "blackmail." *Id.* As a result, plaintiff sued the newspaper for defamation. *Id.* at 8.

The Court held that, "as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported [by defendant]." *Id.* at 13. The Court based its conclusion on the context in which the comments were made and the audience to whom it was directed:

> It is simply impossible to believe that a reader who reached the word "blackmail" in either article would not have understood exactly what was meant: it was [plaintiff's] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging [plaintiff] with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's] negotiating position extremely unreasonable.

Id. at 14. *See also Rush*, 732 A.2d at 653 (relying on the reasoning in *Greenbelt* to hold that an accusation of "patronage" used in a newspaper article about plaintiffs was not capable of a defamatory meaning)

Similarly, in *Letter Carriers* the Supreme Court held that the use of the word "traitor" to describe a union "scab" could not form the basis for a defamation action because, given the context and circumstances in which the word was used, it was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members." 418 U.S. at 284-86. *See also Savitsky,* 566 A.2d. at 905 (holding newspaper's use of the phrase "widow robber" to describe plaintiff in connection with a union life insurance policy he negotiated to be no more than "rhetorical hyperbole, a vigorous epithet," and therefore not actionable as defamation.).

Likewise, the Third Circuit in *Beverly Enterprises* held that defendant's statements about plaintiffs – referring to them as "criminals," union busters and "part of that World War II generation that danced on the graves of Jews" – was "no more than rhetorical hyperbole or a vigorous epithet" but not defamatory. 182 F.3d at 187-88.

More recently, the United States District Court for the Northern District of Ohio granted defendant's motion to dismiss in a case, like this one, based on a comment appearing on an Internet message-board. *SPX Corp. v Doe*, 253 F. Supp. 2d 974 (N.D. Ohio 2003). In that case, defendant posted a message alleging that plaintiff's company was engaged in **"Accounting Fraud!!!"** *Id.* at 977 (emphasis in original). The court held that the forum where the statement was published – an Internet message-board – and the language used demonstrated that the statement was "figurative language and hyperbole," thus it was not actionable as defamation. *Id.* at 982.

Plaintiff here claims that statements "posted" on the Website's message-board are defamatory, presumably because they purport to accuse him of criminal conduct (like the plaintiffs in the cases cited above). But like the words "blackmail" in *Greenbelt*, "traitor" in *Letter Carriers*, "criminal" in *Beverly Enterprises* and "Accounting Fraud" in *SPX Corp.*, the "posts" on the message-board cannot be defamatory "as a matter of constitutional law" because they cannot, when considered in context, be considered statements of fact. *Greenbelt*, 398 U.S. at 13.

In order to understand the context of the two statements, the entire statement (not just the abbreviated version in the Complaint) must be examined, as well as the entire "thread" connected with the statement.[8] Because each individual "post" is part of an online conversation concerning a particular topic, reading statements in context requires reading much of the surrounding content, preceding pages and "links" associated with the content. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("Just as a reader must absorb a printed statement in the context of the media in which it appears, a computer user necessarily views web pages in the context of the links through which the user accessed those pages."); *Karl*, 78 F. Supp. 2d at 397 ("[t]he *entire* context of the communication must be taken into account in evaluating the potentially defamatory character [of the statements at issue]. This means that *the communication must be examined in light of all the material surrounding it*.") (emphasis added).

With respect to the "Bribery Post," the author states, "Aha! Now I know why Arlen Specter got invited to all those Renamity parties! Could it be...bribery of your local politician? Its the only way AD3 can get back at the TMMB [Tucker Max Message Board]." Exhibit C. The subject of the entire "thread" – which was entitled "The End of the TMMB" – is the recently passed Violence Against Women and Department of Justice Reauthorization Act. Exhibit H ("The End of the TMMB" thread) at pg. 1.[9] Defendant started the "thread" by posting an article about the new legislation and suggesting – in a tongue in cheek manner common on the Website – that the usually raucous tone of the discussions on the message-board might be prohibited by the new law. *Id.* at pg. 1.

Accordingly, when read in the context of the "thread", it is clear that the "poster" is joining the tongue in cheek conversation by replying that United States Senator Arlen Specter supported the passage of the Act in exchange for an invitation to parties hosted by plaintiff's company, Renamity. There is no possibility that anyone, especially the intended audience for this Website, would actually believe that Senator Specter – the senior senator from Pennsylvania and one of the most well respected congressmen in either chamber – could be influenced to vote on legislation by the promise of an invitation to one of plaintiff's parties. It is clear that the poster is attempting to be both humorous and insulting by making this statement, which is obvious when read in context.

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[8] A "thread" is a "train[] of thought on a bulletin [or message] board....Users continue a thread by responding to a specific message in that thread or start a new thread to launch an idea into the conversation." Noveck, *Designing Deliberative Democracy in Cyberspace*: *The Role of the Cyberlawyer*, 9 B.U. J. SCI. & TECH. L. 1 (2003).

[9] For the Court's convenience, defendant inserted page numbers on each of the "threads" attached at Exhibits H and I.

Similary, the Fraud Post cannot be defamatory as a matter of law when it too is read in context. That Post, which is contained in a "thread" entitled "Sometimes Failure is Funny," begins with a quote from another "post" authored by "lazy-eyed retard" earlier in the thread. Exhibit I ("Sometimes Failure is Funny" thread) at pg. 38. The quoted portion states: "*However, and most importantly we want to assure* ***all*** *ticket holders that we will be refunding 100% of the ticket price on a* ***case-by-case basis.***" *Id.* (emphasis in original). "PowderJ" responded by "posting" the following message that refers to plaintiff: "What a PR wizard. You threw an abosolutely disastrous party on New Year's Eve precipitated by false advertising and possible fraud, and yet refunds are on a case-by-case basis. I guess if you drank more than two wine spritzers you clearly got your money's worth and are not eligible for a refund." *Id.* Thus, when reading the entire "Fraud Post," "lazy-eyed retard" is describing Renamity's refund policy and "PowderJ" is reacting to what he or she believes is a highly unreasonable and unfair refund policy in light of the facts, as described throughout the thread and the linked articles. *Id.* This is no differerent than the "post" in *SPX Corp.*, which accused plaintiff of "Accounting Fraud." 253 F.Supp. 2d at 982.

When, as is the case here, anonymous statements are made as part of a "free-flowing and highly-animated" discussion about a plaintiff's misfortunes, full of "hyperbole, invective, short-hand phrases and language not generally found in fact-based documents," the statements "lack the formality and polish typically found in documents in which a reader would expect to find facts." *Global Telemedia Intern., Inc. v. Doe 1*, 132 F. Supp. 2d 1261, 1267 (C.D. Cal. 2001); *see also SPX Corp.*, 253 F. Supp. 2d at 981 ("Such message boards are accessible to anyone of the tens of millions of people in this country (and more abroad) with Internet access, and no one exerts control over the content. Pseudonym screen names are the norm. A reasonable reader would not view the blanket, unexplained statements at issue as 'facts' when placed on such an open and uncontrolled forum."); *Rocker Mgmt., LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380, at *2 (N.D. Cal. May 29, 2003) (such messages, most of which "are posted anonymously, . . . are replete with grammar and spelling errors; most posters do not even use capital letters. Many of the messages are vulgar and offensive, and are filled with hyperbole. . . . In this context, readers are unlikely to view [the] messages . . . as assertions of fact."); *Doe v. Cahill*, 884 A.2d 451, 465 (Del. Supr. 2005) ("Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely.").

Nothing could better describe the defendant's message-board. Indeed, the particular forum in which the allegedly libelous statements were made is entitled the "Idiot Board." *See* Exhibit B. Statements on the "threads" at issue include the following:

- By "footinmouth": "Anthony DiMeo III...owner of local PR company..., financial planner, and actor.' a.k.a. A rich kid who just gets to try a whole bunch of shit until he fucks it all up and ends up in the family business living with his parents. Way to go you [sic] lazy-eyed retard!" Exhibit I at pg. 3.

- By "MoistPanties": "So basically this was a party for 700 of the ugliest, slack-jawed, walleyed creatures of the night that reside in Philly." *Id.* at pg. 4.

- By "leavemealone": "I have three words for the owner of the restaurant... Breech of contract! Sue him for all he's got! Even better, sue him for all he doesn't! All those frivolous lawsuits you have against people (not to mention the ones you threatened people with) are finally biting you in the ass, Antnee." *Id.* at pg. 11.

- By "downwiththepants": "I'm beginning to think the face he makes in every photo is one of concentration. His good eye sees the camera. He stares at it in shock for a second or two, until realizes that yes, that most definitely is the person he payed to photograph him. Panic strikes. His lazy eye is firmly fixed upon the photographers [sic] shoe. His mind goes blank, his jaw goes slack. The only thing he can think of is getting not one, but both eyes, on the camera. Then the flash goes, and he fails yet again." *Id.* at pg. 32.

- By "Ribalding": "Grasshoppper Recipe....I shit you not. 25 ml BOLS - Peppermint (Creme de Menthe) 25 ml BOLS - Creme de Cacao (Clear) 35 ml Double Cream Anybody care to speculate as to the origins of the cream? I didn't know you could mix the 3 biggest queen liquers [sic] into one cocktail. Guys, did it come with a little umbrella? Seriously. Amazing." *Id.* at pg. 51.

Whatever this forum may be, it is clearly not the *New York Times* or *Wall Street Journal.* Indeed, it fulfills every indicator of an "unreliable" medium listed above: it is "replete with grammar and spelling errors," "many of the messages are vulgar and offensive, and are filled with hyperbole," "free-flowing and highly-animated" discussion abounds, which is full of "invective, short-hand phrases and language not generally found in fact-based documents." *Rocker Management, LLC*, 2003 WL 22149380, at *2; *Global Telemedia Intern., Inc.*, 132 F. Supp. 2d at 1267. To say that the "posts" "lack the formality and polish typically found in documents in which a reader would expect to find facts" is an understatement. *Global Telemedia, Intern., Inc.*, 132 F. Supp. 2d at 1267. Under these circumstances, a reasonable reader could not interpret any of the referenced statements as "fact."

The mere fact that both the Bribery Post and Fraud Post use language suggesting criminal conduct does not mean that plaintiff has stated a claim for defamation. *See, e.g., Greenbelt*, 398 U.S. at 14; *Letter Carriers*, 418 U.S. at 284-86; *Beverly Enter.*, 182 F.3d at 187-88; *SPX Corp.*, 253 F. Supp. 2d at 982; *Rush*, 732 A.2d at 653; *Savitsky,* 566 A.2d. at 905. To the contrary, given the context of the "threads" and the nature of the forum, no reasonable reader could believe that the "posters" – none of whom were defendant – could be accusing plaintiff of either bribery or fraud. For that reason, the statements are protected by the First Amendment and cannot for the basis of a claim for defamation.

3. Two "Posts" Are Barred By The Statute Of Limitations.

"Pennsylvania has a one year statute of limitations for libel ... suits." *Bradford v. American Media Oper., Inc.*, 882 F. Supp. 1508, 1513 (E.D. Pa. 1995) (Dalzell, J.) (citing 42 Pa. C.S.A. § 5523(1)). At least two of the statements at issue, however, were "posted" more than one year before the Complaint was filed on March 10, 2006: the statement identified in the Complaint at paragraph 5(d) was "posted" on March 4, 2005 at 5:18 p.m. (Exhibit D hereto); and the statement identified in the Complaint at paragraph 5(e) was "posted" on January 4, 2005 at 2:36 p.m. (Exhibit E hereto). Because both of these statements were "posted" more than a year before March 10, 2006 – that date on which plaintiff filed his Complaint in state court – they are barred by the statute of limitations.

For all of the reasons set forth herein, plaintiff's defamation claim should be dismissed with prejudice.[10]

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[10] Contained within plaintiff's defamation count are several conclusory statements that suggest an attempt to plead separate causes of action for misappropriation of likeness, false light, invasion of privacy and the unknown tort of "inciting violence." *See* Exhibit A, Compl. at ¶ 10(c), (f), (g) and (h). Such an attempt, however, fails because the Complaint contains absolutely no facts to support such claims. As the Third Circuit warned, such "[c]onclusory allegations in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *Chemtech Intern. v. Chem. Injection Tech., Inc.*, No. 05-2296, 2006 WL 690837, at *2 (3d Cir. Mar. 20, 2006) (quoting *DM Research, Inc. v. Coll. Of Am. Pathologists*, 170 F.3d 53, 55 (1st Cir. 1999)). This Court is "not required to credit bald assertions and legal conclusions" such as those found in plaintiff's Complaint. *Id.* Instead, the Third Circuit has held that plaintiff is required to plead "supporting facts . . . to provide the defendant fair notice of the plaintiff's claim and the 'grounds upon which it rests.'" *In re Tower Air, Inc.*, 416 F.3d 229, 237 (3d Cir. 2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Plaintiff has failed to meet even this modest standard. As with plaintiff's "Punitive Damages" count, defendant believes that the failure to state a cognizable claim is self-evident. Should the Court desire a more detailed argument, defendant requests the opportunity to submit a supplemental memorandum of law on the issue.

B. Plaintiff's Cause of Action Under the Communications Act of 1943 Fails To State A Claim And Should Be Dismissed With Prejudice.

Count II of the Complaint purports to state a claim under the "cyber-stalking" provisions of the Violence Against Women Act. *See* Violence Against Women and Department of Justice Reauthorization Act of 2005, H.R. 3402 § 113 (entitled "Preventing Cyberstalking") (hereinafter the "VAWA"). That Act, signed by President Bush on January 5, 2006, amends the Telecommunications Act of 1943 to clarify that the "anti-harassment" provisions apply to communications made by a "telecommunications device," rather than merely by a telephone.[11]

Seeking to capitalize on these recent amendments, plaintiff theorizes that:

> Through the hosting, maintenance and publication of the aforesaid site, by transmitting via the internet the aforesaid defamatory publications without disclosing the identity of the maker thereof and/or for commercial purposes, with intent to annoy, abuse, threaten, or harass Plaintiff, and as such, Defendant is civilly liable to Plaintiff for same.

Exhibit A, Compl., at ¶ 14.

This attempted application of an Act plainly intended to protect women from abusive husbands and boyfriends is frivolous for four independent reasons: (1) the VAWA is a criminal statute that does not provide a private right of action to plaintiff; (2) the CDA bars liability against defendant, a provider of interactive computer services; (3) the facts pled do not trigger liability because defendant did not fail to disclose his identity and plaintiff never "received" any of the statements at issue – two prerequisite for liability under the VAWA; and (4) the application of the VAWA sought by plaintiff would be an unconstitutional infringement upon defendant's free speech rights.

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[11] Several of the "posts" at issue appeared on defendant's Website *before* the VAWA was enacted. *See* Exhibit D ("posted" on March 4, 2005); Exhibit E ("posted" on January 4, 2005); and Exhibit F ("posted" on January 4, 2006). Because nothing in the statute's language or history indicates that the statute was intended to apply retroactively (and because a criminal statute such as the VAWA could not constitutionally be applied retroactively), and because it would deprive Mr. Max of a prior right to engage in the speech now complained of, the statute is presumed to have only prospective application. *See generally*, *Dinnall v. Gonzales*, 421 F.3d 247 (3d Cir. 2005). Therefore, the only arguably actionable comments are those "posted" after January 5, 2006.

1. The VAWA Does Not Provide A Private Cause Of Action.

The VAWA provides that anyone who, in interstate or foreign communications, "makes a telephone call or utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications," shall be fined under Title 18 or imprisoned not more than two years, or both. 47 U.S.C. § 223(a)(1)(c).

The plain language of the statute mentions nothing about a cause of action from a private plaintiff, establishes no rights in a private plaintiff, and therefore exposes a defendant only to criminal liability. The decision to pursue a criminal action under a federal statute is left to the discretion of a United States attorney, not a civil plaintiff.

In addition to the lack of any *express* private cause of action contained in the VAWA, there also is no *implied* private cause of action. When determining whether a federal criminal statute creates an implied private cause of action, federal courts look to the intent of the legislature: "Unless such congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Hindes v. FDIC*, 137 F.3d 148, 170 (3d Cir. 1998) (quoting *Karahalios v. Nat'l Fed'n of Fed. Employees Local 1263*, 489 U.S. 527, 532-33 (1989)). As the Supreme Court held:

> Like substantive federal law itself, *private rights of action to enforce federal law must be created by Congress*. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. *Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.* Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander v. Sandoval, 532 U.S. 275, 286-87 (2001) (emphasis added).

In determining Congressional intent, the Court should look primarily to two factors: (1) whether the plaintiff constitutes one of the class for whose benefit the statute was enacted; and (2) whether there is any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one. *Hindes*, 137 F.3d at 169 (citing *Cort v. Ash*, 442 U.S. 66, 78 (1975)). *See also Bieber v. Sovereign Bank*, No. CIV.A. 95-200, 1996 WL 278813, at *4-*6 (E.D. Pa. May 23, 1996).

As for the first factor, plaintiff clearly is not a member of the class intended to be benefited by the statue. As the statute's title indicates, it is intended to benefit victims of domestic violence, not individuals who are upset by annoying or critical statements "posted" on Internet websites. The second factor also works against plaintiff – there is no indication of legislative intent to create a civil remedy at all. If anything, the statute's structure and text is indicative of a congressional intent *not* to create a civil remedy.

Federal courts that have considered this very issue have concluded that there is no private cause of action under the VAWA – it is a criminal statute that cannot be enforced by a plaintiff in a civil action such as this one. *See Jensen v. Shrively*, No. C 02-03143, 2003 WL 917969, at *1 (N.D. Cal. Feb. 25, 2003); *Moore v. Principal Credit Corp.*, No. 4:96CV388-S-B, 1998 WL 378387, at *1 (N.D. Miss. Mar. 31, 1998). Accordingly, Count II should be dismissed with prejudice.

2. The CDA Bars Liability Under The Communications Act Because Defendant Provides Interactive Computer Services.

As noted above, the VAWA applies to whoever "makes a telephone call or utilizes a telecommunications device. . . ." 47 U.S.C. § 223(a)(1)(c). But the Act further provides that it "may not be construed to affect the meaning given the term 'telecommunications device' in section 223(h)(1) of the Communications Act of 1934." H.R. 3402, §113(b). Under that section of the Communications Act, the term "telecommunications device . . . *does not include an interactive computer service*." *Id.* at 223(h)(1)(B)(emphasis added). Because defendant's Website and message-boards are interactive computer services, the statute does not apply to the "posts" at issue in the Complaint.

3. The Facts Pled Do Not Trigger Liability Under The VAWA Because Defendant Did Not Fail To Disclose His Identity and Plaintiff Never "Received" Any Of The "Posts."

The VAWA applies to "whoever . . . utilizes a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number or who receives the communications." 47 U.S.C. § 223(a)(1)(c). Significantly, plaintiff here never alleges that defendant failed to disclose his identity. Indeed, defendant *did* disclose his identity – the Website is called "tuckermax.com" and the message-boards are referred to as the Tucker Max Message Boards ("TTMB"). *See* Exhibit B. A cursory review of the Website reveals that defendant "posts" using his own name, complete with a picture of himself. Exhibit G.

Nevertheless, plaintiff tries to avoid this glaring hole in his Complaint by pleading that defendant is liable because he hosted his Website and transmitted the "annoying" language "without disclosing the identity of the maker thereof." Exhibit A, Compl., at ¶ 14. The VAWA, however, does not create liability when a defendant transmits annoying language "without disclosing the identity of the maker." *Id.* Rather, the statute imposes criminal liability on someone who uses a telecommunications device "without disclosing *his* identity." 47 U.S.C. § 223(a)(1)(c) (emphasis added). In other words, the VAWA only applies when the defendant himself is anonymous, not when a known communicator "posts" anonymous speech authored by another. Here, the statements at issue may have been "posted" by individuals using fictitious screen names, but defendant did not author those statements and always used his name (and picture) when posting on his Website.

Moreover, the VAWA only protects an individual "who **receives** the [anonymous] communication." *Id.* (emphasis added). Indeed, such language makes sense in the context in which the statute is intended to operate: a criminal prosecution in response to "cyber-stalking." Thus, it is conceivable that if plaintiff actually had **received** phone calls, text messages or emails the VAWA might apply here (in a criminal, not civil, prosecution). But that is not at all what occurred. Instead, plaintiff apparently came across the offending "posts" by visiting the Website. Thus, he proactively directed his computer's web browser to defendant's Website and viewed the statements at issue in this case. Such conduct cannot be considered "stalking" by defendant or anyone else.

4. Application Of The VAWA Violates The First Amendment.

As applied to defendant, the VAWA represents a content-based regulation that improperly discriminates against anonymous speech. As the Supreme Court has held, government action that forces a speaker to reveal their identity in certain circumstances "is a direct regulation of the content of speech." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995). Thus, the VAWA is a content-based regulation of speech, and is subject to strict scrutiny.

Even if the VAWA is not subject to strict scrutiny, however, it still runs afoul of the First Amendment. As the D.C. Circuit noted, when a content-neutral government regulation regulates combined "speech" and "non-speech" elements, it will pass constitutional muster only if:

> [1] it is within the constitutional power of the Government; [2] it furthers an important or substantial governmental interest; [3] the governmental interest is unrelated to the suppression of free expression; and [4] the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. Popa, 187 F.3d 672, 676 (D.C. Cir. 1999).

As in *Popa*, the facts here show that the VAWA cannot survive prong four. Significantly, the incidental restriction on First Amendment freedoms are far greater than necessary to further the government's interest. Plaintiff likely will claim an important government interest in preventing cyberstalking, an interest that defendant acknowledges is an important one. The application to this case, however, shows that the statute itself is overbroad when applied in a civil proceeding.

Defendant has merely operated a message-board, which plaintiff was under no obligation to visit. Defendant, and others, commented about plaintiff on several occasions, including news stories relating to plaintiff's New Year's Eve party, which apparently had garnered, at the very least, some public attention. Plaintiff has not pled any facts indicating that any member of the Website's message-board made any attempt to place him in any fear of imminent harm. In other words, the public's important interest in protection of persons from stalking in the form of "annoying, abusive, and harassing" phone calls or other telecommunications would be met just as effectively if the statute did not apply to an Internet message-board commenting on a matter of arguable public concern. *Cf. id.* at 676-77.

For this reason, as well as all of the others set forth in this section, Count II of the Complaint should be dismissed with prejudice.

IV. CONCLUSION

For the reasons set forth herein, defendant respectfully urges the Court to dismiss the Complaint with prejudice.

Respectfully submitted,

Dated: April 19, 2006

MT 829

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April 2006, a true copy of the foregoing Defendant's Motion to Dismiss the Complaint with Prejudice was sent by First Class U.S. Mail, postage prepaid, to the following:

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